CRIMINAL-LAW REFORM IN ENGLAND AND IN THE UNITED STATES[1]

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A CENTURY ago in England the administration of the criminal law was in a very unsatisfactory state. Crime was increasing and it was difficult to convict and punish the guilty. Witnesses perjured themselves, juries failed to convict in the face of clear evidence of guilt, and judges quashed indictments for slight mistakes of form. In 1827 an inquisition for murder was quashed because it was stated that the jurors presented "on their oath" instead of "on their oaths."[2]

The above situation, which was not confined to any one portion of the kingdom, was due to the very severe penalties attached to all offenses and to the great disadvantage at which the prisoner was placed by the law in that he was not allowed counsel, he could not testify in his own behalf, the witnesses in his favor were not sworn, and he was allowed no right to appeal. The public mind revolted at this barbarity and in many instances the human instinct of those who had the duty of administering the criminal law caused the discharge of those who were clearly guilty. The problem in England at this time was one of relaxation—to reduce penalties and modify procedure so as to render the prisoner's position less disadvantageous.[3]

Those who attempted the reform of the criminal law and procedure found four tremendous obstacles in their way. The first was the savage spirit engendered in Englishmen by the French Revolution. Sir Samuel Romilly in 1808 wrote in his diary:

If any person be desirous of having an adequate idea of the mischiev-

[1] Read at the Conference on the Reform of the Criminal Law and Procedure, May 13, 1911.

[2] Cited by Sir Harry Poland in *A Century of Law Reform.*

[3] A series of enactments extending through a century and ending with the Criminal Appeal Act of 1907 accomplished this result.

ous effects which have been produced in this country by the French Revolution and all its attendant horrors, he should attempt some legislative reform on humane and liberal principles. He will find, not only what a stupid dread of innovation, but what a savage spirit it has infused into the minds of many of his countrymen.[1]

The second obstacle was the complacent feeling of the legal profession that the criminal law was perfect, a state of mind due largely to Blackstone's Commentaries.[2] The third obstacle, in part a resultant of the other two, was the fear and dislike of innovation. The history of criminal-law reform in England shows this attitude always present when reforms were urged. If a proposal was new, therefore it was bad. In 1731 Lord Raymond opposed as an innovation a bill enacting that legal proceedings in criminal cases should be conducted in English instead of in Latin.[3] In 1792 Lord Kenyon opposed Fox's libel bill because it was contrary to the practise of a long series of years and tended to alter the established law of the realm.[4] In 1810 Sir Samuel Romilly's bill for the abolition of the death penalty in certain grades of larceny was defeated in the House of Lords on the ground that innovations in the criminal law were dangerous.[5] In the discussion of the Criminal Appeal Bill of 1906 Lord Halsbury questioned the propriety of the bill on the ground that it was an innovation.[6] In referring to the same bill Lord Alverstone said: "It is because this is an innovation in, and a fundamental departure from, our criminal procedure that I think it right to enter my protest against it."[7] Most of the opposition to reform came from those connected with the administration of the law. In speaking of the Criminal Appeal Bill of 1906 Lord Chancellor Loreburn said: "There is an ingrained predisposition on the part of members of the legal profession to resist reforms affecting the law."[8] The fourth obstacle in the way of reform in England was the refusal or at least the failure by

[1] *Life of Romilly*, II, 247.

[2] Campbell, *Chief Justices of England*, III, 353.

[3] *Ibid.*, III, 97.

[4] *Ibid.*, IV, 43.

[5] *Life of Romilly*, II, 326.

[6] 154 *Hansard*, (4th Series) 1002.

[7] 157 *Ibid.*, (4th Series) 1082.

[8] 157 *Ibid.*, (4th Series) 1092.

many to analyze the situation carefully and to determine in deliberate and logical manner what effect the proposed change would have. When Sergeant Glynn in 1770 moved in the House of Commons for an inquiry into the administration of the criminal law, Mr. Solicitor Thurlow proposed a severe censure upon the mover.[1] Sir Samuel Romilly's bills for the abolition of the death penalty in certain offenses were opposed on the ground that crime was increasing. Regarding this, Romilly says in his diary: "It appeared to me, and I stated, that these were rather arguments for than against the bill. What better reason for altering the law than that it is not efficacious; and that instead of its preventing crime, crimes are multiplied under its operation?"[2] The Criminal Appeal Bill of 1906 and that of 1907 were opposed on the ground that they would lessen the responsibility of judges and jurors, since their decisions would be no longer final. It was said in reply, that the reverse would be true and that the decisions of both would be made with more consideration and care because they would be subject to review.[3] Experience has shown this reply to have been correct.

The results of the administration of the criminal law in many parts of this country today are similar to those in England a century ago. Juries are slow to convict, and when they do there is considerable likelihood that there will be a reversal on writ of error. For example, the Missouri supreme court in a recent case, which has been much commented upon, quashed an indictment because the word "the" was omitted.[4] In addition to the difficulty of convicting there is often great delay in the trial of criminal cases. The unsatisfactory result with us is due largely to the fact that our procedure and practise give the prisoner an undue advantage. The privileges of having counsel, of challenging veniremen, of testifying or not as he sees fit, of having a review of the proceedings of the trial, have been so extended and abused that his position has been made almost impregnable. In order to secure the conviction of the guilty

[1] Campbell, *op. cit.*, VII, 30.

[2] *Life of Romilly*, II, 326.

[3] 175 *Hansard*, (4th Series) 222, and 179 *Ibid.*, (4th Series) 590.

[4] State *v.* Campbell, 210 Mo. 202.

without unnecessary delay in the trial, our problem is one of contraction—to restrict to their proper compass the privileges directly or indirectly accorded the accused.

Before we can enter on a program of reform propaganda, however,—before we are safe in proposing the adoption of measures changing our procedure and practise, even though such have proved successful elsewhere, we must analyze the situation before us and determine the influences which affect the administration of our criminal law; for it is as grave a mistake to hold that because a proposal is new it is therefore good, as it is to condemn a measure merely because of its newness.

The characteristic influences in this country which affect the administration of our criminal law may, I think, be traced to four general causes: (I) that this is a new country and a republic, whose citizens have strong and in some cases perverted ideas of democracy and freedom; (II) that we are a heterogeneous people composed of many races involving varied conflicting interests; (III) that our government is a federation, and that there are consequently separate and distinct legal jurisdictions; (IV) that our federal government and our individual states have rigid constitutions, interpreted by the courts.

I. Under the first head may be grouped the following resulting influences which exist in varying degrees in the different states: (1) Lack of respect for the law as such. The mere fact that there is a law forbidding certain acts has comparatively little effect in preventing the commission of those acts. The respect for law in this country is in direct proportion to the extent of its enforcement. As state's attorneys are often disinclined to prosecute except when forced to do so by public opinion, the result in many cases is neither enforcement nor respect. (2) The attitude of the newspapers, which usurp the function of the courts in trying those accused of crime. (3) Lynch law and the unwritten law. Lynch law is but a survival of the ideas of self-help and private revenge prevalent in new communities. The unwritten law is simply the attempt to introduce into the criminal law a practise more or less generally recognized as justifiable. It is customary or common law in the making. This unwritten law has to be reckoned with in re-

forming procedure, because it is no unusual practise for attorneys to enter a plea of insanity in order that they may introduce evidence to support the unwritten law. (4) Strong political influences, which often affect the selection of judges, and determine their conduct after election. (5) Public opinion, which is shifting and easily satisfied—reform generally stops with a new law on the statute book. (6) The fact that legislation is often apportioned to special groups or organizations of men in return for political support. (7) Strong tendency to sentimentality—witness the recent Nevada law giving a criminal condemned to death his choice as to the manner of dying.[1] (8) The *duello* attitude in our criminal trials, resulting from what has been so aptly named our "sporting theory of justice."[2]

II. A large proportion of our population is foreign born or but one generation removed from foreign birth. Inborn race prejudices are strong, and tend to influence men in their judgments. Sometimes this race prejudice finds expression even in legislation. In addition to race feeling strong industrial bias and antagonism exist. The prosecution of Cornelius P. Shea and his associates for conspiracy in connection with the teamsters' strike in Chicago in 1905 was regarded by many members of labor unions as an attack upon the rights of organized labor. This feeling made conviction almost impossible.

III. The fact that the different states are separate and independent legal jurisdictions must be appreciated in considering criminal-law reform. Lay critics of criminal law and procedure are inclined to collect the defects to be found in the systems of procedure of all the states and ascribe these to a mythical system which they designate "American criminal procedure." This is most misleading and tends to develop a spirit of hopelessness, because the situation seems so bad. No one system is nearly so bad as this composite picture. Different kinds of defects are to be found in the different states and even though two states have the same defect, this may be due to entirely differ-

[1] The law gives the condemned man the choice of death by hanging, shooting, or taking hydrocyanic acid.

[2] See Address of Roscoe Pound, *Amer. Bar Ass'n Rep.*, XXIX, 395, 404.

ent causes. Only by careful analysis of the particular system of procedure and the conditions which produce it is it possible to secure intelligent and successful reform in any jurisdiction.

IV. The last of the four general influences which affect criminal-law reform is that of the constitutions. Whether such result is desirable or not I do not propose to discuss here, but the fact is that the constitutions, as interpreted by the courts, exist as imposing obstacles to changes in the law, hence to criminal-law reform. It may be worth while to note a few instances that have arisen very recently. The supreme court of Washington held that it was unconstitutional to take away from the jury the issue of insanity in criminal cases.[1] The supreme court of Wisconsin decided that a law was unconstitutional which provided for the trial of the issue of insanity by a different jury from that which heard evidence as to the commission of the criminal act.[2] The supreme court of Michigan held unconstitutional, as violating the due-process-of-law provision, a statute providing that in homicide cases where the issues involve expert testimony the court shall appoint suitable disinterested persons to investigate the issues and testify at the trial, and the fact that such witnesses have been appointed shall be made known to the jury.[3] The committee on medical expert testimony of the American Medico-Psychological Association in its report before the last meeting of the association recommended: "That in all criminal cases absolutely equal rights should be accorded the medical witnesses for both the prosecution and the defense for the examination of the person alleged to be insane."[4] A law providing for the above would be unconstitutional on the ground that it compels the defendant to furnish evidence to incriminate himself. The committee on trial procedure of the Wisconsin branch of the American Institute of Criminal Law and Criminology at its meeting in Milwaukee last fall recommended that a statute be passed giving the state a writ of error in criminal

[1] State *v.* Strasburg, 110 Pac. R. 1020.

[2] Oborn *v.* State, 126 N. W. R. 737.

[3] People *v.* Dickerson, 129 N. W. R. 199.

[4] *American Journal of Insanity*, LXVII, 185.

cases where the trial court has decided a question of law adversely to the state, the supreme court to decide all questions of law thus presented, but their decision not to effect a reversal or subject the defendant to further prosecution. Though similar statutes have been passed and upheld in some states, yet the United States Supreme Court in February of this year held unconstitutional an act of Congress providing for the decision of a moot question by the court.[1]

One of the most unsatisfactory features of our criminal trials, conducive to great and often unnecessary delay, is the selection of the jury. In the Thaw trial, for instance, seven days were required to select the jury. In the trial of Shea and his associates for conspiracy seventy-eight days were required to complete the jury. In contrast to the experience of these cases, less than half an hour was expended in selecting the Crippen jury in England, and in the equally important trial of Alexander Dickman in the "Newcastle-train-murder case" the only time consumed was in swearing the first twelve jurors called.

As a defendant on trial for felony is entitled by the English law to twenty peremptory challenges and an unlimited number of challenges for cause, the explanation of the great difference between the English practise and that of some of our American states must lie outside the law of procedure. In the first place, the opposing counsel in an English trial discuss the jury panel before the trial and agree to the dismissal of anyone who appears incompetent to be a juror. In this way the necessity for challenge is often removed. This practise on the part of counsel is possible by reason of the character and personnel of the English bar. The barristers are removed from the personal pressure of the client, and are governed by the traditions of their profession and the restraints arising from membership in the Inns of Court. The fact of the divergent types of men who compose our bar, particularly in the large cities, coupled with the prevalent habit of dealing at arm's length and the *duello* attitude of opposing counsel, makes the plan of agreeing to the dismissal of veniremen impracticable here.

[1] Muskrat *v.* U. S., 31 Sup. Ct. Rep. 250.

The most pronounced causes of delay in the selection of our juries is the *voir dire* examination. In the Shea case, as already stated, the examination of the veniremen, 4800 in all, required 78 days. Such preliminary examination is not required in England largely by reason of the homogeneous character of the people, particularly within each class. Juries in England are composed almost entirely of members of the lower middle class, most of whom are native born and under the full influence of English customs and traditions. The result is that for purposes of jury service one dozen lower-middle-class Englishmen is about the same as another dozen. In contradistinction to this, our population, as already shown, is heterogeneous, and this fact renders necessary some form of preliminary examination of prospective jurors. It remains to analyze the causes which contribute to the excessive length of such examinations.

The lack of respect for the law is largely responsible for the fact that the men who are the best fitted for jury service are the ones who make the greatest effort to avoid it. This desire to escape jury service was evident in all the trials, where there was much time consumed in selecting the jury. In the Shea case, for instance, the clerk of the court remarked: "They all want to get out. They step into the jury box scared to death for fear they will have to stay and try the case." In England jury service is regarded as a civic duty, and few attempt to escape it.

The second great cause of delay in the selection of our juries is the daily newspapers.[1] As soon as a crime has been committed the newspapers publish extensive accounts, giving facts in detail, rumors as well, and not always making a distinction between them. Not content with this, they often adopt an attitude for or against the prisoner. Opinions as to the guilt or innocence of the accused are thus created in the minds of the readers, which tend to make them unfit for jury service. The *Chicago Tribune*,[2] referring to the trial of Luetgert in 1897 for the murder of his wife, boastfully published the following:

Like others questioned Stone was asked what papers he had read, and

[1] See article by Frances Fenton in the *American Journal of Sociology*, November, 1910, and January, 1911.

[2] August 25, 1897.

like the others questioned Stone had read some of the accounts in the *Tribune* of the arrest and search of the police. Subsequently Stone was allowed to go for cause. With one exception all the veniremen had read the accounts in the *Tribune*.

Following the Crippen case in England the editors of two of the leading newspapers were fined for publishing improper accounts of the evidence.

The third cause of delay in the selection of the jury is the failure of the presiding judge to exercise the function and prerogative of his office to control and restrain the examination of the veniremen. The *Chicago Tribune*,[1] in commenting editorially on the delay in the selection of the jury in the Shea case, said: "For eleven weeks the judge has been a helpless and impatient spectator of the effort to fill a jury box with twelve men acceptable alike to prosecution and defense. He has been silent while lawyers wrangled. He has drawn his pay but has done no real work." There is no legitimate reason why the judge should be a helpless spectator of the effort to select a jury. Though the legislatures in some states have taken away from the judges the right to decide the law of the case, and have enacted that the jurors shall decide questions of law as well as of fact, the judge, even in such states, is the presiding officer. He can control the proceedings of the trial, and can regulate the examination of veniremen just as he can the examination of witnesses during the trial. Some judges, however, desire to escape the responsibility of interfering in the *voir dire* examination. Others are unwilling to offend counsel who may have been influential in securing the particular judge his position. Still others fear to run the risk of being reversed by the higher court. Whatever may be the reason, the fact remains that the judges fail to exercise their power to lessen delay in the selection of juries, and thus shorten our criminal trials.

The moral from all this is that careful study and analysis of conditions, legal, political and sociological, must precede proposals for change in our criminal law and procedure, if successful reforms are to be achieved.

[1] November 30, 1906.